

BOSTON
CHICAGO
FRANKFURT
HAMBURG
HONG KONG
LONDON
LOS ANGELES
MOSCOW
NEW JERSEY

EX PARTE OR LATE FILED

Latham & Watkins

ATTORNEYS AT LAW
WWW.LW.COM

ORIGINAL
NEW YORK
NORTHERN VIRGINIA
ORANGE COUNTY
PARIS
SAN DIEGO
SAN FRANCISCO
SILICON VALLEY
SINGAPORE
TOKYO
WASHINGTON, D.C.

October 24, 2001

RECEIVED

OCT 30 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

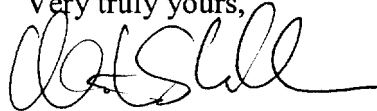
Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
455 12th Street, S.W.
Washington, DC 20554

Re: WT Docket No. 01-14: Notice of Ex Parte Presentation

Dear Ms. Salas:

Please file the enclosed letter as an ex parte presentation in connection with the above-referenced proceeding. The original and one copy of this letter are enclosed.

Very truly yours,



William S. Carnell
of LATHAM & WATKINS

No. of Copies rec'd 012
List A B C D E



RECEIVED

OCT 30 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 29, 2001

BY HAND DELIVERY

Chairman Michael Powell
Federal Communications Commission
455 12th Street, S.W.,
Washington, DC 20554

Dear Chairman Powell:

I write regarding the CMRS spectrum cap. I am concerned that proposed changes I have seen reported in the trade press would effectively eliminate the spectrum cap on a flash-cut basis: The press reports that the Commission might raise the cap to 55 MHz immediately – allowing the immediate combination of a 25 MHz cellular with a 30 MHz PCS license – and provide for the cap's complete elimination in 18 months. We at Leap believe that this proposal would be unwise, and contrary to the public interest. I therefore propose an alternative compromise, that would better serve the public interest, while accommodating the concerns raised by CTIA and the large wireless providers, allegedly justifying an increase in the cap.

First, I should note that Leap rejects the premise that the cap should be relaxed at all. We have seen no evidence that any carrier is capacity constrained because it lacks sufficient spectrum. Nor have we seen any evidence that the spectrum cap does or would block mergers that would otherwise produce efficiencies of scale or scope. And there is no evidence that carriers are prevented by the cap from introducing "3G" services.

Nor have we seen evidence that there is meaningful competition in CMRS that would eliminate the need for the spectrum cap. Indeed, the average Herfindahl-Hirschman Indexes (HHIs) among the top 25 CMRS markets is 2,611 – well above the level considered "highly concentrated." We believe that the prices and service offerings of incumbent carriers reflect this market concentration. And we know that when Leap is able to enter a market, all consumers (not just our own customers) see dramatic benefits – prices fall by an average of 37 percent, and consumers enjoy an average of 41 percent more minutes of use. Indeed, the

Leap Wireless International, Inc.
10307 Pacific Center Court
San Diego, California 92121
T: (858) 882 6000
F: (858) 882 6010
www.leapwireless.com



traditional wireless carriers have established price and service offerings that fail to appeal to 61 percent of all Americans: The success of Leap's Cricket plan demonstrates that there is a large segment of the market for whom the "competition" among traditional wireless carriers is meaningless.

With that said, I recognize the pressure that has been placed on the Commission by those who would prefer to relax this restraint on spectrum concentration and consolidation. And I understand that, as a practical matter, the Commission may seek a compromise solution. With that in mind, I propose the following:

- After 12 months, eliminate the cap in the top 15 MSAs, thereby granting relief in large markets six months earlier than in other reported compromise proposals.
- 90 days after issuance of the 700 MHz "upper band" licenses, raise the cap to 55 MHz everywhere else.
- 90 days after issuance of the 700 MHz "lower band" licenses, eliminate the cap entirely.

We believe that this proposal has merit because it would give the industry incumbents what they want – rapid relief in the larger cities, and certainty that the cap will be relaxed and then lifted at some identifiable point. At the same time this proposal would help protect the public interest by tying the cap's elimination to the availability of new spectrum. And it would allow firms like Leap time to prepare and adjust their business models, which have been structured in part based on the current regulatory regime.

We believe it is critically important for the Commission to link any relaxation of the spectrum cap to the availability of new spectrum. The basic rationale for the cap is rooted in spectrum scarcity, which makes possible certain types of anticompetitive conduct that would be difficult to sustain were further entry into the marketplace available. Only when new spectrum comes available does this anticompetitive potential diminish. Any decision to eliminate the cap at some date that is not tied to the availability of new spectrum can only be seen as arbitrary.

Likewise, we believe that this phased approach will help the Commission avoid inflicting a "flash cut" that would disrupt business plans and investor expectations. To relax or eliminate the spectrum cap will have a profound effect on the CMRS industry. And



to do so precipitously would have the perverse effect of harming those who structured their affairs based on the Commission's regulations, while rewarding those who did not. The Commission has often undertaken a phased approach to its implementation of such sweeping changes, in order to allow firms to structure their affairs rationally, and to avoid penalizing those who rely on the existing regulatory structure.¹

We at Leap believe that the spectrum cap is good public policy and that it remains in the public interest. We are troubled by the proposal that would raise the cap immediately and on a flash cut basis, and eliminate the cap before any new spectrum is made available. Yet we believe that our alternative compromise will achieve most of the benefits to industry that the Commission seeks, while minimizing the negative impacts on smaller carriers and consumers. I sincerely hope that you will consider and adopt this proposal.

Please feel free to contact me, or Dan Pegg on my staff, should you have any questions or wish to discuss this matter further. I would be happy to fly to Washington and meet with you if that would assist your decision in any way.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Harvey P. White".

Harvey P. White
Chairman and CEO

cc: Commissioner Kathleen Abernathy
Commissioner Michael Copps
Commissioner Kevin Martin

¹ See, e.g., Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, FCC 01-146, ¶ 37 (rel. April 27, 2001) ("we are reluctant to flash-cut CLEC access rates . . . a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models").